

U.S. Department of Labor

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February 27, 2017

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VIA HAND DELIVERY

The Honorable Steven B. Berlin
UNITED STATES DEPARTMENT OF LABOR
Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

Office of Administrative Law Judges
San Francisco, CA

Re: OFCCP v. Google Inc., Case No. 2017-OFC-00004, Response to
Defendant Google Inc.'s Request for Clarification

Your Honor:

I write to respond to Google's February 23, 2017 letter regarding the limits for the deposition the Court permitted in its February 21 Order. Suggesting the Court's Order was somehow unclear, Google asserts it needs "clarification" as to whether it can ask questions about the "scope, relevancy, and burdens" of OFCCP's requests. 2/23/17 Sween Ltr. at 1-2. The Court clearly and correctly rejected Google's request to take such discovery on such issues. Google's thinly disguised motion for reconsideration should be denied.

In refusing Google's request for wide-ranging discovery into OFCCP's ongoing investigation, the Court outlined the limited deposition it was allowing in unambiguous terms. The Court permitted Google to take a deposition of OFCCP's "employee most knowledgeable about *how OFCCP selected Google* for a compliance review."¹ 2/21/17 Order at 5 (emphasis added). Directly answering Google's request for clarification, the Court also defined the scope of the deposition, limiting it to "routine background . . . and questions related to the manner in which OFCCP selected Google for a compliance review." *Id.* No clarification of this language is necessary.

Indeed, Google's current request may have been spurred by OFCCP's prompt compliance with the Court's Order. On February 22, responding to the Court's Order, OFCCP identified Deputy Regional Director Jane Suhr as the person most knowledgeable about Google's selection. In pursuit of efficiency, OFCCP went further and provided Google with a declaration from Ms.

¹ Indeed, Google begins its request by mischaracterizing the Court's Order as permitting the company to "depone OFCCP's Person Most Knowledgeable regarding the OFCCP compliance evaluation at issue in this matter." 2/23/17 Sween Ltr. at 1. The Court authorized no such deposition, and OFCCP did not designate Ms. Suhr as being such person.

Suhr answering the question of how the company was selected. As Ms. Suhr explains, Google was selected based on OFCCP's Federal Contractor Selection System ("FCSS"), which uses using neutral selection criteria to generate sequentially-ordered lists of contractor establishments that local OFCCP district offices must strictly follow when scheduling compliance evaluations. See Suhr Decl. ¶ 2; see also *id.*, Ex. A (explaining FCSS). To avoid any doubt, OFCCP also provided the FCSS-generated scheduling list on which Google appeared, showing Google's position in line for a compliance review. *Id.*, Ex. B.

Google's apparent disinterest in this testimony does not now warrant permitting it to ask Ms. Suhr about "the scope, relevancy, and burdens of OFCCP's requests." Google appears to base its request on *United Space Alliance LLC v. Solis*, which the Court relied on in rejecting Google's initial request for such discovery, noting that the Court must evaluate whether OFCCP's requests are (1) relevant to evaluating Google's compliance with its contractual and regulatory equal opportunity obligations, (2) sufficiently specific, and (3) not unduly burdensome. However, it is unclear how the beliefs of Ms. Suhr, or any other witness, will assist the Court in determining these issues. As the parties' briefing on summary judgment shows, the facts necessary to determining whether OFCCP's requests are appropriate are already before the Court: (1) OFCCP is currently evaluating whether Google's employment practices, including how it pays its employees, comply with its equal opportunity obligations; and (2) as part of that ongoing investigation, OFCCP requested pay data, data bearing on pay, and employee contact information to make its determination.

Google's persistent and increasingly transparent effort to interfere with and invade OFCCP's investigation prior to its completion is troubling. As the Court has recognized, notwithstanding Google's "vigor" in litigating this expedited proceeding, "there is surprisingly little at stake in this case," which—like subpoena enforcement or motion to compel proceedings—simply revolves around whether OFCCP's requests were permissible. 2/21/17 Order at 2 (quoting *United Space*). Google's request for reconsideration should be denied.

Respectfully submitted,

JANET M. HEROLD
Regional Solicitor

By:



MARC A. PILOTIN
Trial Attorney

Attachment

CC: Lisa Barnett Sween (via e-mail)

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

GOOGLE, INC.,

Defendant.

OALJ Case No. 2017-OFC-00004

OFCCP No. R00197955

**DECLARATION OF JANE SUHR REGARDING GOOGLE INC.'S SELECTION FOR
COMPLIANCE REVIEW**

Case Subject to Expedited Proceedings under 41 C.F.R. § 60-30.31

I, Jane Suhr, hereby declare as follows:

1. I am the Deputy Regional Director for the Pacific Region of the Office of Federal Contract Compliance Programs, United States Department of Labor ("OFCCP"). I have served previously as the District Director for the Los Angeles District Office of OFCCP. In both roles, I have had experience with scheduling contractors for compliance evaluations pursuant to the Federal Contractor Selection System ("FCSS"). If called as a witness, I could and would testify competently to the matters set forth in this Declaration.

2. OFCCP relies on FCSS to generate sequentially-ordered scheduling lists that local district offices strictly follow to schedule contractors for compliance evaluations. FCSS generates such scheduling lists based on neutral selection criteria, as explained further on OFCCP's webpage containing Frequently Asked Questions about FCSS, a true and correct copy of which is attached as **Exhibit A**.

3. OFCCP's San Jose District Office initiated a compliance review of Google in September 2015 because Google was the next contractor in order on that office's FCSS scheduling list. Consistent with OFCCP's Active Case Enforcement procedures, memorialized in OFCCP Directive 2011-01, the District Office did not skip any contractors on the FCSS scheduling list prior to Google. Attached as **Exhibit B** is a true and correct copy of the relevant portion of that list, showing Google's position in the scheduling order.

I declare under the penalty of perjury that the foregoing is true and correct and that this declaration was executed on February 22, 2017.


DocuSigned by:

006F16D073D24E9
JANE SUHR

Exhibit A

United States Department of Labor

Office of Federal Contract Compliance Programs

Office of Federal Contract Compliance Programs (OFCCP)

Federal Contractor Selection System (FCSS) – Frequently Asked Questions

- [What scheduling cycle does OFCCP use for the FCSS?](#)
 - [How many establishments are on the current Scheduling List?](#)
 - [How many industries are represented on the current Scheduling List?](#)
 - [How many companies are represented on the current Scheduling List?](#)
 - [How many Corporate Management Compliance Evaluations \(CMCE\) are included in the current Scheduling List?](#)
 - [How does OFCCP select federal contractor establishments for a compliance evaluation?](#)
 - [How does OFCCP schedule compliance evaluations among the selected establishments?](#)
 - [Is there a regulatory or statutory limit on the number of establishments that can be scheduled per contractor?](#)
 - [Is there an operational limit on the number of establishments that can be scheduled per contractor?](#)
 - [Can a contractor establishment that is not on the FCSS list be scheduled for a compliance evaluation?](#)
 - [Can a contractor establishment that was evaluated recently be scheduled for another compliance evaluation?](#)
-

What scheduling cycle does OFCCP use for the FCSS?

For the past several years, OFCCP's scheduling cycle for supply and service contractor establishments has been based on its fiscal year (FY), which runs from October 1 through September 30 of the next year. Number of releases and size of each release depend on the agency's workload and resources. Similarly, compliance evaluations may be scheduled beyond the FY of its release depending on the workload and pace of processing compliance evaluations in the local office.

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How many establishments are on the current Scheduling List?

There are a total of 800 establishments on this first release of the FY 2017 Scheduling List.

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How many industries are represented on the current Scheduling List?

Based on the 2-digit NAICS code, the first release of the FY 2017 Scheduling List covers 29 industries.

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How many companies are represented on the current Scheduling List?

375 distinct companies are represented on the first release of the FY 2017 Scheduling List.

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How many Corporate Management Compliance Evaluations (CMCE) are included in the current Scheduling List?

The first release of the FY 2017 Scheduling List includes 30 CMCEs..

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How does OFCCP select federal contractor establishments for a compliance evaluation?

OFCCP's FCSS is a neutral selection system that identifies federal contractor establishments for compliance evaluations. The FCSS process uses multiple information sources such as federal acquisition and procurement databases, EEO-1 employer information reports, Dun & Bradstreet (D&B) data, Census data, and statistical thresholds such as industry type and employee counts of federal contractor establishments.

The process, data sources, and factors used to develop the scheduling list may vary from list to list. However, the starting point for all lists is the Federal Procurement Data System – Next Generation (FPDS). The FPDS is compiled and maintained by the U.S. General Services Administration and captures all federal contract transactions. OFCCP evaluates the individual transactions from which it develops a list of active contracts and identifies the contractors associated with each contract that fall under the agency's jurisdiction. OFCCP uses such data sources as EEO-1 and D&B data to identify the corporate parent and/or affiliated establishments of the covered contractors identified through FPDS. The EEO-1 and D&B data also may be used to confirm the address and employee count at each establishment.

The list is further refined by applying a number of neutral factors such as contract expiration date, contract value, and pre-defined operational limits on the number of establishments per contractor that may be scheduled in any one cycle. Establishments covered by Functional Affirmative Action Plan (FAAP) agreements, currently under review, reviewed within the prior twenty-four months, subject to current conciliation agreements or consent decrees, or waiting for scheduling from the prior list are also removed.

Lastly, OFCCP determines the total number of establishments to be reviewed. The total number of establishments reviewed is based on OFCCP region and district office staffing levels of full time employees (FTE).

The final scheduling list for each district office is sorted using any one of a number of neutral factors including, but not limited to, alphabetical order, employee count at the establishment, contract value or contract expiration date. The first and every 25th establishment on each district office list are marked for a quality review per the [Active Case Enforcement Directive](#).

OFCCP also schedules other types of compliance reviews, such as FAAP reviews, individual or class complaint investigations, directed reviews initiated by OFCCP's National Office based on reports of an alleged violation, pre-award evaluations in response to requests for pre-award clearance from federal contracting officers, and the monitoring of conciliation agreements and consent decrees.

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How does OFCCP schedule compliance evaluations among the selected establishments?

Once establishments are identified for compliance evaluations by OFCCP's National Office, the FCSS list is ordered in a neutral fashion (see the previous FAQ) and uploaded into the OFCCP computer system that distributes the list of establishments to each OFCCP district office based on the physical addresses of the establishments. When an office is ready to schedule an establishment for evaluation from the FCSS list, it accesses the computer system that is maintained by OFCCP's National Office. This system releases the name and address of the next establishment on the list for that office. For each establishment, the district office must either schedule the establishment for a compliance evaluation or note the reason(s) for not doing so. If the establishment is scheduled for an evaluation, the District Office must enter the date the scheduling letter is sent to that establishment. Information pertaining to the actions taken for each establishment by the OFCCP field office is recorded in the OFCCP computer system controlled by OFCCP's National Office in order to maintain the integrity of the FCSS list. Once scheduled, however, a field office may manage open evaluations with flexibility because not all evaluations proceed at the same pace. That is, a field office is permitted to defer action on an evaluation after scheduling it for any number of practical reasons, such as the need to resolve legal or policy issues, or to determine the use of its investigative resources in a more efficient manner. As a result, field offices work on multiple evaluations at the same time and are not required to complete one evaluation before selecting another establishment for scheduling or acting on another evaluation that has already been scheduled.

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Is there a regulatory or statutory limit on the number of establishments that can be scheduled per contractor?

There is no legal requirement that limits the number of establishments per contractor that OFCCP may schedule for compliance evaluation.

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Is there an operational limit on the number of establishments that can be scheduled per contractor?

From list to list, OFCCP may set caps or limits on the number of establishments per contractor that can be scheduled for review. The decision to set caps or limits is based on factors that include agency resources and local office workload. For example, the number of FTE in each Regional and District Office determines the total number of establishments on each office's list as well as the total number of establishments on the nationwide list. In the previous Scheduling List, OFCCP limited the number of compliance evaluations to a total of no more than 25 for each corporate parent. Also, with respect to the last list, each district office was assigned no more than one CMCE and one College/University evaluation.

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Can a contractor establishment that is not on the FCSS list be scheduled for a compliance evaluation?

Yes. OFCCP may conduct a compliance evaluation of an establishment not on the FCSS list under certain circumstances:

- **Pre-award Compliance Evaluation:** Contractor establishments pending an award of a federal supply and service contract of \$10 million or more may undergo a compliance evaluation.
- **FAAP Compliance Evaluation:** These evaluations are scheduled from the companies that have an active FAAP agreement with OFCCP.
- **Directed Review:** These compliance evaluations may be scheduled by OFCCP when it receives credible information of an alleged violation of a law or regulations the agency enforces, including those deriving from individual or class complaints filed with the EEOC, or state or local fair employment practice agencies (FEPAs) that allege employment discrimination covered under the laws that OFCCP enforces.
- **Conciliation Agreement and Consent Decree Follow-Up Evaluation:** These evaluations are scheduled during the monitoring period of an executed conciliation agreement or consent decree based on information received in a scheduled progress report, or when OFCCP otherwise needs to determine compliance with the terms of the agreement or decree.

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Can a contractor establishment that was evaluated recently be scheduled for another compliance evaluation?

A contractor establishment should not be scheduled for another FCSS compliance evaluation during the 24-month period following the date on which the prior review was closed. A contractor establishment that is still subject to reporting obligations pursuant to a Conciliation Agreement or Consent Decree should not be scheduled for another FCSS compliance evaluation during the 24-month period following the expiration of the agreement or decree. If an establishment that was evaluated within the past 24 months is selected for a compliance evaluation, the establishment's representative should call the local OFCCP office which issued the scheduling letter.

Notwithstanding this limitation, OFCCP may schedule a follow-up compliance evaluation if there is an indication that the contractor establishment is not complying with either reporting requirements or agreed upon actions that resulted from an active Conciliation Agreement or Consent Decree. OFCCP also may conduct a compliance evaluation when it receives an individual or class complaint, or when it determines there is credible information of an alleged violation of a law or regulation enforced by OFCCP.

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Exhibit B

CANDIDATE_ID	UNIT_ID	CNTL_NO	Scheduled Office Code	Candidate Office Code	Case Office Code	COMPANY NAME	START DATE	candidate status	PICKED_TIME	Letter sent Date	HOLD_START_TIME	HOLD_REASON	DaysBetween
116159	L56779	R00197777	IH	IH	IH	[REDACTED]	11/3/2014	Scheduled	9/15/2015 17:40	9/18/2015			3
116160	ZD0460	R00197995	IH	IC	IC	Google Inc	11/3/2014	Scheduled	9/29/2015 10:33	9/30/2015			1
116161	ZD0461	R00197996	IH	IH	IH	[REDACTED]	11/3/2014	Scheduled	9/29/2015 10:33	9/30/2015			1
116162	T06484	R00198018	IH	IH	IH	[REDACTED]	11/3/2014	Scheduled	9/30/2015 14:07	10/1/2015			1